No. 14188

United States
COURT OF APPEALS
for the Ninth Circuit

BART McKENNEY and MARIE McKENNEY, individually and as co-partners doing business under the name of McKenney Logging Company, *Appellants,*

vs.

BUFFELEN MANUFACTURING CO., a corporation, *Appellee.*

EINAR GLASER, DOROTHY GLASER and McKENNEY LOGGING CORPORATION, a corporation *Appellants,*

vs.

BUFFELEN MANUFACTURING CO., a corporation, *Appellee.*

BRIEF OF APPELLANTS EINAR GLASER and DOROTHY GLASER

Appeals from the United States District Court for the District of Oregon.

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 5-54

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STATEMENT OF JURISDICTION

Jurisdiction of the United States District Court for the District of Oregon is based on *Title 28 U.S.C.A., Sec. 1332* (Diversity of Citizenship).

The complaint alleges that Plaintiff is a California Corporation that Defendants Einar Glaser and Dorothy Glaser and Defendants Bart McKenney and Marie McKenney, and Defendant J. B. Carr, are citizens of the State of Oregon; that Defendant Edward M. Buol is a citizen of the State of Washington and Defendant McKenney Logging Corporation is a Washington Corporation, and that the matter in controversy exceeds, exclusive of interests and costs, the sum of $3,000.00 (Tr. 1). These allegations are admitted (Pretrial Order, Tr. 10).

The jurisdiction of this Court is based on *Title 28 U.S.C.A., Sec. 1292.*

ABSTRACT OF THE CASE

For the purpose of convenience, the parties will be referred to as they are designated in the contract.

Plaintiff-Appellee Buffelen Manufacturing Co. will be referred to as the "*Lumber* Company".

Defendants-Appellants Bart McKenney and Marie McKenney, husband and wife, and Einar Glaser and Dorothy Glaser, husband and wife, co-partners doing business under the name of McKenney Logging Company, will be referred to as the "*Logging* Company".

Defendant-Appellant McKenney Logging Corporation will be referred to as the "Logging *Corporation.*"

The Lumber Company is the assignee of the contract involved herein and will be referred to herein as

though it was the party to the contract from the inception.

The complaint charges violation of the contract (Ex. 1, Tr. 125), supplemented by contract (Ex. 2, Tr. 146).

The Lumber Company was engaged, among other things, in operating sawmills for the manufacture of lumber, and a plywood mill for the manufacture of plywood.

The Logging Company (partnership) was engaged in the business of logging timber lands and selling the logs to saw and plywood mills. It logged timber lands, which it owned outright, and timber lands, which it held under contract of purchase, as well as contracts giving it right to cut and remove timber from the lands of others, including the State of Oregon, and Clatsop County, Oregon.

For some time prior to the making of the contracts involved herein, the Logging Company sold logs to the Lumber Company and the Lumber Company, from time to time, "advanced" monies to the Logging Company for various purposes, including the purchase of timber lands and contracts.

The contract, so far as material at this point, provides that the Lumber Company has "advanced" monies to the Logging Company for the acquisition of timber lands and timber contracts, construction of roads, a bridge over the Nehalem River, equipment and for other purposes, and, *particularly, for the completion of the purchase of what is referred to as the "Belding Timber," "Tillamook Yellow Fir Timber," and "Scritsmier*

Timber" upon which the Logging Company had contracts of purchase and which it had been logging. Payment in full had to be made by December 1, 1946, or the contract would be forfeited. The monies "advanced" were used, among other things, to make payment for said lands.

To secure the re-payment of the "advances", the title to these timber lands was taken in the name of the "Lumber Company" and the Logging Company was required and it did, at the same time, transfer to the Lumber Company, the title to timber lands which the *Logging Company already owned,* as well as transfer of all of the *timber contracts which the Logging Company owned.*

Provision was made for the re-payment of the "advances" with interest at the rate of 4% per annum. Taxes and all other carrying charges were to be paid by the Logging Company.

The Lumber Company was given the *option* to purchase "all" "the entire output" of the logs to be logged from all of the timber lands at market price. Payment for the logs was to be made by the Lumber Company ten days after invoice.

Provision was made that the Lumber Company should deduct $5.00 per thousand from the purchase price of all logs to be applied to the payment of all "advances" until the full amount of all "advances", for all purposes, plus interest, were paid. The title to all of the timber lands and timber contracts was to be reconveyed to the Logging Company on the conclusion of

the operations for a consideration of $1.00 if all "advances" were re-paid.

By June 1950, the Logging Company had re-paid to the Lumber Company all "advances" for the purchase price of timber and other purposes, together with the interest thereon. (Finding of Fact, par. IV Tr. 87 and stipulated facts in pre-trial order, par. IV Tr. 12).

On or about September 1, 1951, the Logging Company sold and transferred to McKenney Logging Corporation, all of its interests in said timber lands and timber contracts. The partners of the Logging Company had no interest in this corporation. It was organized by Buol and Carr.

The complaint charges violation of the contract by the Logging Company in two respects:

(a) Transferring of the assets to the Corporation without the written consent of the Lumber Company;

(b) Alleged failure of the Logging Company and the Corporation to sell logs to the Plaintiff.

The cause of action against the Logging Company is for *breach of contract.*

The cause of action asserted against the Corporation is in *tort* for unlawfully inducing a breach of the contract.

Plaintiff prayed for judgment and decree:

(a) Enjoining the Logging Company (Partnership) from breaching the contract;

(b) Enjoining the Logging Corporation and Carr and Buol from interfering with or inducing breach of the contract, and from trespassing

upon and cutting or injuring Plaintiff's land and timber thereon;

(c) For damages.

The damages claimed, upon the trial, and allowed by the Court, were:

(a) $50,000.00 the value of 2,000,000 feet of logs, allegedly removed by the Corporation, from the Belding Timber lands;

(b) $118,000.00 alleged loss of profit from the alleged failure to supply logs to the mill at Batterson, Oregon.

The decree also

(1) Permanently restrained the Logging Company (Partnership) from breaching the contract;

(2) Restrained the Corporation from trespassing on the lands or injuring, or cutting, timber thereon, and from interfering with or inducing a breach of the contract;

It was also decreed

(3) That the sale by the Partnership to the Corporation and transfer of their assets be cancelled, set aside, and declared void and of no effect;

(4) It rendered judgment against the Partners in the sum of $168,000.00, being the sum of $50,000.00 for the removal of the timber and $118,000.00 for loss of profits resulting from the failure to supply logs for the operation of the mill at Batterson, Oregon.

(5) Judgment was rendered against the Corporation for the same amounts except that the damages of $50,000.00 for the removal of timber was trebled, making the total judgment against the Corporation, $268,000.00.

The appeal is from that judgment and decree.

THE QUESTIONS INVOLVED

The principle question is the construction of the contract between the Lumber Company and the Logging Company. All other questions are subsidiary thereto and are in a large part, if not entirely, determinable by the interpretation which the Court will place upon the contract.

Appellants contend that the transaction, evidenced by the contract, is, in equity, merely a loan of money by the Lumber Company to the Logging Company; that all of the lands described in the contract were transferred to the Lumber Company, to secure the loans and not to vest absolute title in the Lumber Company; that the relation between the parties was that of mortgagor and mortgagee; that while the loans were unpaid, the Lumber Company held the title to the lands as security merely; that when the loans were paid in full in June 1950, the Lumber Company ceased to have any interest in the lands and held the naked legal title in trust for the Logging Company; that thereafter the Logging Company was the sole owner of the timber lands and contracts; that after June 1950, the only surviving right, if any, of the Lumber Company, under the contract, was an "option" to purchase logs from the Logging Company at market price; that thereafter the cutting and removal of logs from those timber lands, either by the Logging Company or by the Corporation, was not a conversion of the Lumber Company's property; that the appellants were the owners thereof, had the right to remove the same and were not guilty of

either conversion or trespass; that if there was any liability to the Lumber Company at all by reason of the removal of logs from those lands (assuming the Lumber Company had a subsisting option to purchase said logs and had exercised the option), it would be for the difference between the price which the Lumber Company was required to pay appellants for the logs (market price) and the price which the Lumber Company was obliged to pay therefor to replace them.

Appellants contend that they were not liable to plaintiff for the alleged removal of 2,000,000 feet of logs of the alleged value of $50,000.00, because:

(a) The Lumber Company was not the owner of the logs;

(b) There is no substantial evidence to establish the quantity of logs removed; that they were removed from the Belding tract; that the Lumber Company ever exercised the option to purchase said logs.

Appellants contend that they are not liable for the $118,000.00 of damages alleged to have been sustained by reason of the alleged failure to supply logs to the Batterson Mill, because:

(a) There is no substantial evidence that the Lumber Company sustained any damage at all. The record establishes affirmatively that the Batterson Mill obtained a sufficient quantity of logs to operate the mill during the time in question on a *one shift basis,* that being the extent of the obligation under the contract.

(b) There is no substantial evidence to sustain any operating loss, the evidence introduced being both speculative in character and otherwise incompetent.

Defendants-Appellants contend that the Plaintiff failed to establish any cause of equitable cognizance or equity jurisdiction. Assuming that the Lumber Company had a surviving option to purchase logs, such option does not create any interest in property prior to exercise of the option, and the Lumber Company had an adequate remedy at law for a violation of the option if any there be, to-wit, the recovery of damages measured by the difference between the contract price and the amount it would have to pay for logs.

Appellant Corporation contends that there is no substantial evidence in the record to establish that it unlawfully induced the breach of the contract.

SPECIFICATION OF ERRORS

I.

The Court erred in granting equitable relief, to-wit: injunction and cancelling, and setting aside, the conveyances from the Logging Company to the Corporation on the ground that the case presented no ground of equitable cognizance. The Plaintiff had an adequate remedy at law for the alleged breach of the contract.

II.

The Court erred in finding (VIII, Tr. 88) that McKenney and Glaser did not tender logs to the Lumber Company.

III.

The Court erred in finding (X, Tr. 88) that the Corporation removed 2,000,000 feet of timber from Plaintiff's land after September 1, 1951, of the value of

$25.00 per thousand feet and that the Lumber Company was damaged in the sum of $50,000.00 by reason thereof.

IV.

The Court erred in finding (XI, Tr. 88) that the Corporation had knowledge of the contract between Plaintiff and Logging Company and that the Corporation removed timber from Plaintiff's land wilfully and intentionally.

V.

The Court erred in finding (XII, Tr. 88) that Plaintiff sustained damages in the sum of $118,000.00 for loss of profits in the operation of its mill at Batterson and in the sum of $50,000.00 for timber removed by the Corporation and by the attempted sale of the properties by the Logging Company to the Corporation.

VI.

The Court erred in finding, if it be deemed a finding, (XIII, Tr. 89) that Plaintiff sustained damages in the sum of $118,000.00 by reason of the Corporation's interference with and inducing Defendants McKenney and Glaser to breach the contract.

VII.

The Court erred in finding that the Corporation refused to tender to Plaintiff for purchase, all logs removed by it from the lands referred to in the contracts (XIV, Tr. 89).

VIII.

The Court erred in finding (XV, Tr. 89) that the Corporation refused to dump all logs removed by it

from the lands and rights covered by the contract, into the pond at the Batterson Mill.

IX.

The Court erred in finding (XIV, Tr. 89) that the purpose and intent of the contract, Exhibit 1, was not an accommodation or an advance of money by Plaintiff to McKenney and Glaser with which to purchase the timber lands, and in refusing to find that the transaction was, in equity, a loan of money by the Lumber Company to the Logging Company; that the transfers of title to the plaintiff were made as security therefor, and in failing and refusing to find that the relationship of the parties was that of mortgagor and mortgagee.

X.

The Court erred in making the conclusion of law (I, Tr. 90) that the contract was unbreached by the Plaintiff on September 1, 1951.

XI.

The Court erred in the conclusion of law (II, Tr. 90) that McKenney and Glaser were obliged to tender all logs produced by them from the logs covered by the contract to Plaintiff for purchase prior to selling them to others.

XII.

The Court erred in the conclusion of law (III, Tr. 90) that McKenney and Glaser were not in a position to sell their interest in the lands to the Corporation, and in refusing to hold that the Lumber Company had acquiesced therein.

XIII.

The Court erred in the conclusion (IV, Tr. 91) that the Corporation was charged with knowledge of Plaintiff's ownership of the lands and contracts at the time of the transfer thereof by the Logging Company to the Corporation.

XIV.

The Court erred in the conclusion (V, Tr. 91) that the contract, in question, was not a loan and security agreement.

XV.

The Court erred in the conclusion (VI, Tr. 91) that McKenney and Glaser, on September 1, 1951, or prior thereto, were not the owners of the timber lands and contracts described in the contract, and that the said lands and contracts were not held by Plaintiff as security for loans and advances made to Defendants.

XVI.

The Court erred in the conclusion (VII, Tr. 92) that the contract did not terminate upon re-payment of the loans and advances, together with the interest thereon, at least in sofar as it involved the ownership of the lands and contracts described therein.

XVII.

The Court erred in the conclusion (XIII, Tr. 92) that the contract did not limit the Lumber Company's right to logs for use in the Batterson and Tacoma mills, and in refusing to hold that the plaintiff was not entitled, under said contract, to logs for the purpose of selling them to others or trading the logs for lumber,

or for the purpose of supplying logs to Gould or the Diamond Lumber Company, or any other purpose.

XVIII.

The Court erred in the conclusion (IX, Tr. 92) that the purchase by Plaintiff of logs after September 1, 1951, removed from the lands described in the contract by the Corporation, did not constitute a ratification of the transfer from the Logging Company to the Corporation, and that such purchases did not constitute an estoppel to assert a breach by reason of the transfer of the Logging Company's interest to the Corporation without Plaintiff's written consent thereto.

XIX.

The Court erred in the conclusion (X, Tr. 92) that McKenney and Glaser did not become entitled to a conveyance of the lands described in the contract when they paid in full all of the monies owing to the Lumber Company with interest thereon, and in refusing to hold that upon payment of all loans, McKenney and Glaser were the equitable owners of all the timber lands and contracts, and that Plaintiff held only naked legal title in trust for them.

XX.

The Court erred in the conclusion (XI, Tr. 93) that McKenney and Glaser were liable to Plaintiff for $168,000.00 damages for the reasons assigned therein.

XXI.

The Court erred in the conclusion (XII, Tr. 93) that the Corporation is liable to Plaintiff for three times the value of the logs alleged to have been removed in

the total sum of $150,000.00 for intentionally trespassing on the Plaintiff's land and wilfully and intentionally cutting timber therefrom, and that it was liable for $118,000.00 damages for interfering with the contract between Plaintiff and McKenney and Glaser, and inducing a breach thereof.

XXII.

The Court erred in the conclusion (XIII, Tr. 93) that Plaintiff is entitled to a permanent injunction restraining McKenney and Glaser from breaching the contract, and restraining the Corporation from trespassing on the lands and cutting timber therefrom and setting aside the transfer made by the Logging Company to the Corporation.

XXIII.

The Court erred in the conclusion (XIV, Tr. 94) directing entry of judgment and decree in favor of the Plaintiff.

The grounds upon which the findings are alleged to be erroneous, have been set forth in the previous statement of the questions involved.

XXIV.

The Court erred in excluding Defendants' Exhibit No. 24 (Tr. 555), being a contract (Tr. 556) entered into on May 22, 1946, between the parties which preceded and was the genesis of the transaction referred to in the contract, Exhibit 1 (Tr. 126).

XXV.

The Court erred in admitting in evidence Plaintiff's Exhibits 19-a, 19-b and 19-c over Defendants' objection

(Tr. 200 to 202). (The exhibits are too lengthy to be re-produced at this point and are elsewhere referred to.) The exhibits consist of tabulations of "cost reports" made by Plaintiff and were objected to on the ground that they were immaterial and related to periods of time not in controversy (Tr. 202).

XXVI.

The Court erred in admitting in evidence Plaintiff's Exhibit No. 22 over Defendants' objection (Tr. 475 to 480). The exhibit appears at page 480 of the transcript. It purports to be a profit and loss statement of the operation of the Batterson Mill prepared by Plaintiff. It was objected to (Tr. 475) when offered (Tr. 462) on the ground that there was no foundation for it; that it was not pertinent to the issues; that it was merely a conclusion; that there was no evidence that the figures were correct or what they were derived from, and that it was a self-serving document. The Court excluded the document at that time (Tr. 464). It was again offered (Tr. 475) and was again objected to (Tr. 475 and 476) and was admitted conditionally as follows:

> "The Court: I think with the situation as it is, I will receive it. I will still consider your objection after I consider all the testimony."

The exhibit was received "subject to the objection" (Tr. 479).

STATEMENT OF FACTS

In the years 1943, 1944, and 1945, McKenney was engaged in logging operations and the Lumber Company was purchasing substantially all of his output of logs. In those years, McKenney borrowed money from the Lumber Company to carry on operations and the loans were secured by chattel mortgages on McKenney's equipment. During that period of time, McKenney entered into a contract with Belding Logging Company to buy from it green timber, which included timber lands containing about 32,000,000 feet of timber. This included timber which the Belding Company was buying from the Tillamook Yellow Fir Company. Under that contract, McKenney was required to pay for all of the timber land on or before December 31, 1946. After he had been logging for some time on this land, it became apparent that he was not going to be able to pay the balance of the purchase price by that date line. He applied to the Lumber Company for a loan of money with which to complete payment for that timber, and the Lumber Company "advanced" the money (Tr. 282-283). When this money was "advanced", a written contract was entered into (Def. Exh. 24, set out in full, Tr. 556). It was offered in evidence, but was rejected by the Court as "entirely immaterial" (Tr. 555), and the ruling is assigned as error.

This earlier contract, dated May 22, 1946, recites that the Logging Company is the owner of, and has under contract, timber lands having thereon approximately 130,000,000 feet of timber which is described in

a schedule attached to the contract (Tr. 564-567) and are the *same timber lands described in the later contract (Ex. 1), including what is referred to in the case as the Belding Timber, Tillamook Yellow Fir, etc.;* that it is the intention of the Lumber Company to build a sawmill and an unwinding mill (plywood mill); that the Logging Company is the owner of roads, mill sites, re-load facilities, equipment, spur tracks, and other facilities required in logging operations; *that the Logging Company had a contract for the purchase of the Belding Timber and the Tillamook Yellow Fire Company timber,* which required that the timber be logged on or before December 31, 1946 and paid for at the rate of $3.50 a thousand and payment in full for the timber must be made by December 31, 1946 (Tr. 557).

The Lumber Company agreed to build the mills and to "buy" from the Logging Company and "pay for" *all* logs cut from said timber lands. Payments were to be made within ten days after invoice. The Lumber Company agreed to "advance" approximately $50,000.00

> "to be paid on or before December 31, 1946 to the Belding Logging Company and/or Tillamook Yellow Fir Company . . . to protect and acquire good title to the timber which the logger has under contract."

This is the same timber involved in this controversy.

The contract then provides:

> "In the event such 'advance' is made by the Lumber Company, the Logger will *secure such 'advance'* by contemporaneously therewith transferring title to such timber so acquired to the Lumber Company" (Tr. 559).

Provision is made for the deduction of $3.50 a thousand from the purchase price of logs to be applied to the re-payment of the "advances" for the timber,

> "until the full amount of the 'advance' has been paid."

The contract then provides that the Logging Company agrees to sell to the Lumber Company, all the marketable logs cut on the tracts of land described in Schedule A,

> "and also on all other lands now owned or subsequently acquired in the Cook Creek Area" (Tr. 559).

The Lumber Company was to pay the Logging Company for the logs at "the then market price" (Tr. 560). It is also provided that if additional timber lands are acquired in that area, that they should come under the terms of the contract (Tr. 561).

The mills, referred to, were not built at the time the contract (Ex. 1) was entered into on January 8, 1948.

The balance owing on the contracts for the purchase of the Belding and Yellow Fir Timber, was paid on or prior to December 1, 1946, and title thereto was taken in the name of the Lumber Company. (Pl. Ex. 8, Deed recorded January 30, 1947, Tr. 158, and Pl. Ex. 9, Deed recorded January 30, 1947, Tr. 161). The contract recites that it was expected that approximately one-half of the timber on the Belding and Yellow Fir Tracts would be logged and paid for prior to December 31, 1946, at which time the final payment had to be made (Tr. 557).

The written agreement, here involved (Pl. Ex. 1, Tr. 125), is dated January 8, 1948, about a year and seven months after the first agreement was made. It is a novation of the former contract. It recites (Tr. 126) that the Logging Company had for years been engaged in acquiring timber and timber lands and logging contracts; that the Lumber Company and the Logging Company

> "having by either written or oral contracts had an agreement wherein the Lumber Company had the first right and exclusive option to purchase all of the entire output of the logs. . . ."

It further recites that the loggers had entered into a contract with Belding Logging Company under which they were required to complete logging of the Belding timber by December 31, 1946, or

> "forfeit their rights under the contract."

(This is the same contract referred to in the prior contract); that prior to December 31, 1946, it was apparent that the loggers would be unable to complete the logging of the Belding Tract and that it had been agreed that the Lumber Company would acquire the holdings of the Belding Company, the Scritsmier Company and the Yellow Fir Timber Company "with whom" the loggers had a contract (Tr. 126-127); that the timber lands covered by said contract, were acquired at a cost in excess of $130,000.00. It recites further that other timber contracts and cutting rights

> "are owned by the loggers for which, in many instances, the Lumber Company 'advanced' the necessary funds to the loggers;"

and that the parties had agreed that the Lumber Com-

pany would "advance" a substantial sum of money for other purposes (Tr. 127). It further recites that the Lumber Company is the owner of the timber lands and contracts described in Schedules A and B. (These are the same properties described in the earlier contract) and that the Logging Company is the owner of the properties and contracts described in Schedule C. It then recites that the purpose of the Lumber Company is to keep its mill at Tacoma and the mill, which it is building at Batterson, in logs and with no desire on its part to make a profit out of the logging end of its business. After these recitals, it was agreed that the Lumber Company would complete the sawmill at Batterson (the plywood mill was never built); the Logging Company would log the area and pay the Lumber Company $5.00 per thousand feet until all money "advanced," or subsequently to be "advanced" for all purposes, including the purchase of the timber lands and contracts with interest at 4% per annum, and including also all taxes and carrying charges and expenses incurred by the Lumber Company in connection with the purchase of the timber, was paid in full. The $5.00 per thousand was to be deducted from the purchase price which the Lumber Company was to pay to the Logging Company for the logs (Tr. 130-131).

The contract then makes this important provision:

> "In the event, however, when the timber of the Lumber Company is all logged, the logger shall pay to the Lumber Company any additional amount required to reimburse it for the total cost of those holdings as herein defined and in the event the logger has paid more than the actual cost, then

> the Lumber Company shall refund such over-payments to the loggers" Tr.. 131).

The contract then makes provision for the purchase of logs by the Lumber Company from the Logging Company removed from all of the lands at "market price" (Tr. 131-132); and for the *re-conveyance* of the lands and contracts to the Logging Company at the end of operations for the consideration of $1.00 (Tr. 132).

The Logging Company, on its part, agreed (Tr. 133) to log the timber on the lands described in the contract and deliver the logs to the Lumber Company

> "at its mill at Batterson or on cars at the logger's re-load at Batterson";

to construct a bridge across the Nehalem River. The Logging Company agreed to log a sufficient number of logs of the character required or desired by the Lumber Company for the use of its mill at Batterson; to keep in the log pond, a sufficient supply of logs to keep the Lumber Company's fill in continuous operation *on a one shift* basis.

In subparagraph (e), Tr. 134, the Logging Company gives to the Lumber Company, at all times,

> "the first right and option to purchase the entire output of the Loggers at the market price or the mill pond price as herein provided."

The Loggers agreed not to assign this contract, nor to assign, sell, or convey any of the lands or timber contract rights, or logging road rights, owned by the Loggers in the area covered by the contract except with the written consent of the Lumber Company.

It is then "mutually agreed" (Tr. 135) that the mill was constructed upon the agreement of the Loggers *"or their successors in interest"* to provide the logs needed to keep the Batterson Mill in continuous operation *"on a one shift basis"* and the "first right or option to purchase at the market price," all of the merchantable fir timber coming from the lands owned or controlled by the Loggers or by the Lumber Company,

> "for use in its plant at Tacoma or for use in its sawmill at Batterson."

The schedules attached to the contract describe the lands bought in part with the money "advanced" by the Lumber Company and conveyed directly to it (including the Belding tract) and the lands already owned by the Logging Company and conveyed to the Lumber Company as additional security. (Substantially the same as in the former contract.)

On May 10, 1948, a supplemental agreement was entered into (Pl. Ex. 2, Tr. 146). It refers to the agreement of January 8, 1948 (Pl. Ex. 1), and then recites:

> "Whereas, the Loggers desire to obtain a further 'advance' from the Lumber Company in the sum of $24,000.00 for the purpose of purchasing approximately 4,000,000 feet of fallen and standing merchantable timber from the Estate of H. E. Piatt, deceased, . . . together with certain logging equipment . . . and Whereas, the Lumber Company is willing to 'advance' the additional sum of $24,000.00 *to enable the Loggers to obtain the above described timber and logging equipment.* . . .

It is then agreed that the Lumber Company will "advance" to the Loggers, the cash sum of $24,000.00;

that the Loggers shall purchase all of the timber, referred to, with the logging equipment; that the Loggers shall obtain a bill of sale to the personal property and a "sufficient assignment of the cutting contracts" from the Estate of H. E. Piatt. It is then agreed that the Loggers will log the timber and give the Lumber Company

> "at all times the first right and option to purchase all of the logs produced from said land at the market price or mill pond price, as provided under the contract between the parties hereto dated the 8th day of January, 1948.";

that the Lumber Company shall deduct from the market price of the logs, as fixed by the earlier agreement, on all logs sold to the Lumber Company, $10.00 per thousand feet until the sum of $24,000.00 has been fully paid.

The Lumber Company did not exercise the option to purchase "the entire output of the logs'. The Lumber Company only purchased about one-half of the output (Tr. 299).

The Lumber Company did not purchase any peelers for the Tacoma plant or at all after June 1, 1949 (Tr. 301). The mill at Batterson was operated intermittently from the time of its completion in March 1948 to June 29, 1951, when it was shut down and was not put in operation until October 1, 1951 (Tr. 190-205).

At the time of the shut-down on June 29th, there was approximately one-half million feet of logs in the pond and on or about that date, an additional one-half million feet of logs were put into the pond at the Batter-

son mill, so that there was approximately a million feet of logs in the pond at the Batterson mill at the time of the shut-down and was available for processing when the mill was opened on October 1st.

Prior to September 1, 1951, the relationship between the parties was fairly satisfactory although the Logging Company complained about the Lumber Company's practice of reducing the prices on logs by questioning grades.

Instead of buying logs for the purpose of supplying peelers to its Tacoma plant and for the operation of the Batterson plant, it engaged in the business of selling the logs elsewhere and trading them for lumber, which was contrary to the purpose of the contract (Tr. 187, 214, 217, 320).

By June 1950, the Logging Company had paid to the Lumber Company all of the "advances" made by the Lumber Company for the purchase of timber, lands, and contracts, and for all other purposes, including interest thereon at the rate of 4% per annum (Finding 4, Tr. 87) and the Lumber Company had been reimbursed for all other expenses for attorneys' and title companies' fees, taxes, fire insurance, and so forth (Admitted, Tr. 285-286). From that date, the Lumber Company merely held the naked legal title to the properties in trust for the Logging Company.

The Lumber Company was not in possession of any of the properties at any time. They were in possession and control of the Logging Company and were being

logged by the Logging Company and by the Corporation after the sale September 1, 1951.

On September 27, 1951, Buol and Carr (Corporation) went to Tacoma and had an interview with the Lumber Company's Officers and Representatives. They informed them that the Corporation had acquired the Logging Company's interests and that they wanted to become acquainted with the customers who were buying logs from that operation and talked to them about purchasing the Batterson mill, or making some arrangements for the operation of the mill. They believed that because the mill had been shut down for a long period of time, that the Lumber Company would be interested in disposing of the mill or arranging for its operation. They were told that the day before, an arrangement had been made to sell the mill to a Mr. Gould, or the Diamond Lumber Company, which Mr. Gould owned or controlled. At that conversation, the Lumber Company's Representative called attention to the contract with the Logging Company and he inquired whether they were aware of the contract. When told that they were not, he produced the contract, which was examined. They stated that the contract would make no difference because they were there to sell the logs to the Lumber Company in any event (Tr. 340). *The Lumber Company's Representatives admit that Buol and Carr offered to sell them the logs and that they had come up for that purpose* (Tr. 258, 265, 373). A further conference was had the following day and consultations were had with Counsel for the Lumber Company with respect to the

contract, but the important fact is that the Lumber Company's officials did not then, or at any time thereafter prior to the commencement of this action, object to the transfer of the business by the Logging Company to the Corporation, nor did they claim that there was a violation of the non-assignment provision of the contract.

On the contrary, the discussions related to the continued sale of the logs from these timber lands to the Lumber Company. The Lumber Company complained that they had not received an invoice for one raft, which had been made up after the Corporation took over. Buol and Carr assured them that from that time on, there would be no trouble about invoices; that they intended to take over the business of invoicing themselves to avoid any delays or annoyances on that account.

At those two interviews, when Buol and Carr were informed that the Lumber Company was selling the mill to Gould, they were told that Gould would determine what logs he wanted and that they were to make arrangements with him regarding the logs for the Batterson mill (Tr. 375). Buol and Carr informed them that that was satisfactory to them. All they were interested in, was to sell the logs, but they wanted to know who would pay for the logs and they testified that they were told that they would have to look to Gould for the payment of the logs. Pohlman and Holm, Lumber Company Representatives, denied this and testified that they said that they would pay for the logs.

Within a few days thereafter, Gould and Buol and Carr discussed the matter of the payment for the logs

at the mill, or in the vicinity of the mill. They wanted to know about Gould's financial ability to pay for the logs. Gould tried to satisfy them of his financial ability and told them he had $150,000.00 available for that purpose (Tr. 331). They pointed out that that was insufficient to take care of the quantity of logs that would be produced according to their rate of production (Tr. 382). (Not contradicted by Gould.) It also developed that Gould wanted to have all logs, in excess of the amount which could be used at the Batterson mill, to be stored at another location or to be delivered to another mill which his Company owned.

In the meantime, log rafts were being scaled and the scale sheets were sent to the Lumber Company.

The plan of handling logs, as outlined by Gould, was unsatisfactory for another reason. Under the contract with the Lumber Company, peeler logs were to be selected and supplied to the Lumber Company for its use at its Tacoma plant. Peeler logs sell for a considerable amount in excess of the price of saw logs which are cut up into lumber. Under Gould's plan, all of the logs were to be delivered either at Batterson or at his own mill, or cold decked, and paid for as "saw" logs, which was not in accordance with the contract arrangements.

The sale of the Batterson Mill by the Lumber Company to Gould was not consummated, but an agreement was made between the Lumber Company and Gould that Gould should start the operation of the Batterson mill on October 1, 1951, for his own account; *that he was to receive all the profits* and *was to bear all of the*

losses that *might result from the operation of the mill,* and the Lumber Company would buy the logs for Gould as his agent (Tr. 230). The mill was thereafter operated on that basis.

The incident that precipitated this controversy involved the sale of raft No. 46. This raft was scaled September 4, 1951, after the Corporation took over the operations. The scale sheet shows that it was scaled for the account of the Corporation. The scale sheet was received by the Lumber Company on September 19th. Under the practice that had prevailed, the Lumber Company was to make out the invoice if it desired to exercise the option to purchase the raft. It had this scale sheet in its possession at the time of its interview with Buol and Carr on September 27th and 28th and had not yet exercised the option to purchase it. It exercised the option to purchase the raft on October 3, 1951, at which time the Lumber Company made out an invoice for that raft and sent it to the Logging Company (not the Corporation) with a remittance for the amount of the invoice, payable to the Logging Company. On October 9th, the Logging Company returned the remittance to the Lumber Company with a letter advising that the raft had been sold. The notation on the scale sheet shows that it was sold on October 3rd, which is the same day that the Lumber Company mailed the invoice and remittance to the Logging Company and was probably received a day or two thereafter. The transaction is shown by Plaintiff's Exhibit 4 (Tr. 154-156) which consists of the scale sheet, the check with the statement thereon, and the letter returning the check.

There was a delay from September 19th, when the Lumber Company received the scale sheet, to October 3rd, in exercising the option to purchase the raft, which was a much longer period than normal for exercising the option. The raft was sold after this delay, on the assumption that the Lumber Company did not intend to take the raft. The average time for exercising the option was a few days (Exhs. 12, 13, 14, 15).

The check was returned on October 9th and seems to have precipitated this litigation because the complaint was filed October 15th without further notice or communication (Tr. 6). It is highly significant that from September 27th, when the Lumber Company became aware that the Corporation had purchased the Logging Company's interests and was conducting the Logging operations, and October 15th, when the complaint was filed, that *the Lumber Company did not in any of the oral conversations had with Buol and Carr, or by any other communication, refuse to recognize the Corporation as the "successor in interest" of the Logging Company, or object to the transfer as being in violation of the non-assignment provision of the contract, but on the contrary, attempted to carry on business with the Corporation.* It insists that they were willing to pay for the logs that would be delivered to Gould and did itself, attempt to exercise the option to buy from the Corporation, raft No. 46 with the full knowledge that it had become successor in interest to the Logging Company. It is in no position, therefore, to urge the failure to obtain the *written* consent as a breach of the contract.

In any event, there is not a scintilla of evidence in the record that any damage resulted from the failure to obtain the written consent to the transfer. The only damage that is claimed in the case, allegedly resulted from the alleged failure to supply logs to the Batterson Mill.

The record establishes the transfer from the Logging Company to the Corporation was not made for the purpose of avoiding the option to the Lumber Company to purchase logs; that it was the intention that the successors in interest would continue to supply the logs; that they were desirous of doing so and went to Tacoma for that purpose to confer with the Lumber Company (Tr. 258, 265, 373).

The transfer of the mill by the Lumber Company to Gould introduced the controversy as to who should exercise the option to buy and pay for logs. While the discussions, arising from the introduction of Gould into the situation, were in progress and without any notice, this suit was initiated.

Other pertinent facts will be referred to and discussed later in connection with the specific assignments of error.

ARGUMENT

POINT I

The transaction described in the contract constitutes a loan of money by the Lumber Company to the Logging Company secured by conveyance to the Lumber Company of the timber lands and contracts described in the contract. The relationship was that of mortgagor and mortgagee and upon payment of the loans, the Lumber Company's interest in the timber lands terminated and thereafter it held the naked legal title in trust for the Logging Company, the beneficial owner thereof.

Practically all of the question presented upon this appeal, depend for their determination upon the construction to be placed upon the transaction described in the contract (Pl. Exh. 1).

It is well settled that in determining whether a transaction creates a mortgagor and mortgagee relationship or an absolute conveyance, all negotiations from the inception preceding and leading up to the contract in question, must be considered in order to arrive at the intention of the parties.

59 C.J.S., 77, Sec. 40, Title Mortgages.
Umpqua Forest Ind. v. Neenah-Oregon Land Co., 188 Or. 605, 217 Pac. 2d 219.

The genesis of the relationship between the parties goes back to 1943 (Tr. 280-281). McKenney was engaged in logging in a small way and the Lumber Company was purchasing logs from him. McKenney borrowed money from the Lumber Company with which to

carry on his operation. The loans were secured by chattel mortgages on his equipment (Tr. 281). He had a chance to purchase some timber land and he borrowed some money from the Lumber Company with which to make the purchase. The loan was secured by chattel mortgages on his equipment.

He then had an opportunity to purchase about 32,000,000 feet of green timber from the Belding Logging Company, which included timber contracts which Belding Logging Company had with Tillamook Yellow Fir Company. He obtained a contract for the purchase of those timber lands (Tr. 282-3). *These are the same timber lands involved in the present controversy.* By the terms of that contract, he was required to have all of the timber removed or paid for by December 31, 1946 (Tr. 282) or forfeit the contract.

After he engaged in logging that area for some time, it became apparent that he would not be able to complete the logging operations and pay for the timber by December 31, 1946. In that situation, he went to the Lumber Company

> "to get the money to buy this timber and the Lumber Company advanced some money to buy this timber." (Tr. 282).

This transaction was evidenced by a written contract dated May 22, 1946 (Def. Exh. 24, Tr. 556).

This contract was offered in evidence, but was rejected by the Court as "entirely immaterial" (Tr. 555). This ruling is assigned as error. We submit that this contract should have been admitted in evidence for it

involves the identical transaction and throws light upon the intention and purposes of the parties in entering into the contract now under consideration and should be considered in interpreting the latter contract.

59 C.J.S., page 77, sec. 40, Title Mortgages, says:

> "On the question whether a deed absolute in form was intended as a mortgage, it is proper to consider the previous negotiations of the parties, their agreements and conversations, and *the course of dealings between them prior to and leading up to the deed in question.*" (Emphasis supplied)

In the Umpqua case, supra, the Oregon Supreme Court held that in cases of this character, the Court should consider, among other things,

> "The conduct of the parties both before and after the transaction, insofar as such conduct prospectively and *retrospectively* throws light upon the intention of the parties at the time of the transaction." (Citing many Oregon Cases). (Emphasis supplied).

The earlier contract (Exh. 24, Tr. 556) was absolutely pertinent and material evidence to show the true intention of the parties. It demonstrates that from the inception the transaction was founded upon loans and *not* upon sales. Once a mortgage always a mortgage is the rule in equity. Exhibit 1 is actually a continuation or renewal of the first contract (Exh. 24) in a modified form and relates to the very property here involved.

We have already analyzed this contract of May 22, 1946. It is evident from the face thereof, that the Lumber Company merely loaned McKenney a part of the money that paid for the Belding and Tillamook Yellow

Fir Timber lands and that the title was conveyed directly to the Lumber Company to *secure the indebtedness.* He also conveyed to the Lumber Company other timber land and contracts which he owned as *additional security.* It is perfectly obvious from a reading of it, that it was, in legal contemplation a mortgagor and mortgagee transaction with all the incidents inherent in such relationship and involved the identical timber lands that are now in question.

The mill was not constructed during the period of time referred to in that contract.

The *contract, now in question* (Pl. Exh. 1, Tr. 125), is dated January 8, 1948. While the first contract was made with McKenney alone, the second contract was made with McKenney and his wife and Glaser and his wife, all as co-partners doing business as "McKenney Logging Company." Glaser and McKenney had been operating together for some years as co-partners. The contract of January 8, 1948, covers the same timber lands and is obviously a renewal or continuation of the earlier contract and, indeed, recites (Tr. 126):

> "Whereas for the past several years the Lumber Company and the loggers have by either written or oral contracts had an agreement . . . . ."

which clearly refers to the contract of May 22, 1946 (Exh. 24), and the earlier oral contracts. It makes the same recitation with respect to the contract by the Logging Company for the purchase of the Belding timber and so forth.

The essential recitations and contractual provisions, both with reference to the loan and the security, as well as the option to the Lumber Company to purchase logs, are, in essence, the same.

Summarizing the transaction in the light of the earlier transactions and contracts, it is as follows:

(a) The Lumber Company loaned to the Logging Company part of the money with which to purchase timber lands and acquire timber contracts and to build roads, a bridge, and to finance other operating costs.

(b) The Logging Company secured the loans by having the timber lands purchased in part with said loans, conveyed direct to the Lumber Company and, *in addition thereto, the Logging Company conveyed to the Lumber Company, timber lands and timber contracts which it owned and had acquired without the financial assistance of the Lumber Company.*

(c) The contract gives to the Lumber Company an option to purchase at market price, "all"—"entire output" of logs that the Logging Company would cut from all of said timber lands.

(d) The contract creates an absolute obligation to re-pay to the Lumber Company all of the loans "advanced" with interest thereon at the rate of 6% per annum.

(e) Payment was to be made by the Lumber Company deducting $3.50 per thousand from all payments which it was to make to the Logging Company for logs purchased by the Lumber Company until the full amount of the loans, including the loans for the purchase of timber, were paid in full, together with the interest thereon.

(f) *The contract provides that in the event all of the timber is removed from the timber lands in question and the Lumber Company has not been paid in full, the Logging Company was to remain liable for and pay the unpaid balance of the loans.*

(g) The Logging Company was required to pay, and did pay, all taxes, fire insurance, and other carrying charges in connection with the timber lands.

(h) The Logging Company paid to the Lumber Company the attorneys' fees for the services rendered in connection with the purchase of the timber land. and the Logging Company paid the title policy fees.

(i) Throughout the entire transaction, the Logging Company was deemed to be the owner and seller of the logs removed from the timber lands and the Lumber Company the purchaser thereof.

(j) In June 1950, more than a year prior to the alleged default, the Logging Company paid the Lumber Company in full for all "advances" and loans made by the Lumber Company, together with the full amount of interest therein which, in legal contemplation, terminated the mortgagor-mortgagee relationship and the Logging Company became the equitable owner of the timber lands and the contracts and the Lumber Company was merely the holder of the naked legal title in TRUST for the Logging Company.

(k) Upon completion of the logging operations, all of the timber lands were to be re-conveyed by the Lumber Company to the Logging Company for the consideration of $1.00.

Taking the contract by its four corners in the light of the preceding contract (Exh. 24) and the earlier oral contracts, the transaction consists of two distinct parts:

(1) a mortgagor and mortgagee relationship which terminated when the loans were paid in full, and (2) an option by the Lumber Company to the Logging Company to purchase "all" of the logs produced by the Logging Company at market price.

This was the situation (assuming, without admitting, that the option survived and was not otherwise abandoned by the Lumber Company) when the Logging Company sold its interests in the timber lands to the Corporation.

The Court below held that the transaction was not a loan and security transaction, and we submit that this was clearly an erroneous determination when viewed in the light of the authorities hereafter referred to.

Each of the circumstances or factors referred to above individually, are entirely consistent with the mortgagor-mortgagee transaction, and taken collectively, a money lending transaction, and there can be no doubt that the relationship of the parties was that of a mortgagor and mortgagee.

We have in this case the anomolous situation where the Lumber Company claims ownership of the timber lands which, as a matter of law, would carry with it ownership of the timber thereon, and yet it is purchasing timber cut into logs from the Logging Company and paying the Logging Company the market price therefor. In other words, according to its own version, it is buying its own timber and paying therefor at the market price. This is obviously an incongruous position.

The creation and subsistence of the obligation to repay the loans with interest in any event, even after the timber was removed, is in itself conclusive of the relationship of debtor and creditor and mortgagor and mortgagee.

The conveyance by the Logging Company to the Lumber Company of *its own timber lands and timber contracts,* which it had acquired with its own resources, clearly constituted *additional security*. There is no consideration for the conveyance of those timber lands to the Lumber Company except as security. The transaction cannot be split up into two parts so as to say that the timber lands, conveyed to the Lumber Company which was purchased in part with the "advances", was an absolute conveyance and the conveyance of the Logging Company's own timber lands was security,

It is recognized by the Courts in this class of cases that borrowers in distressed conditions or acting under some business compulsion, will submit to exacting demands when applying for loans and where the lender insists on conveyance of the title to property, subject to defeasance upon payment of the loans, that the transaction will be deemed, in equity, to be a mortgage transaction with all of the incidents inherent therein.

In this case, the transaction had its origin in applications for loans. As already pointed out, prior to the contract of May 22, 1946, McKenney was borrowing money from the Lumber Company and the loans were secured by chattel mortgages. After the Belding and Tillamook Yellow Fir timber lands were purchased on contract, the

Logging Company found itself in a distressed condition. It was up against a date line. Payment in full of the balance had to be made by December 31, 1946. It was known that this payment could not be made and this resulted in an application to the Lumber Company for a loan with which to pay the balance of the purchase price. The Logging Company was under economic pressure and coercion at the time and it had to submit to the exaction of having the timber lands conveyed direct to the Lumber Company and, in addition thereto, to convey their own lands to the Lumber Company as additional security.

Under the authorities that will be presently cited, the fact that a transaction originates in an application for a loan and the borrower is under compulsion, is a most important circumstance pointing to the true character of the transaction.

In the *Umpqua case,* supra, the Oregon Supreme Court held that the use of the term "advance" is "most significant."

In *Roesch v. Equitable Savings & Loan Association,* 176, Or. 7, the Oregon Supreme Court held that the term "advance" "implies a loan."

To the same effect, see *Carney v. Murphy,* 195 Pac. 2d 339; *Brock v. Fidelity Deposit Co.,* 75 Pac. 2d 605.

The fact that title to part of the timber lands and contracts were transferred by the vendor direct to the Lumber Company, does not preclude the transaction from being a loan and a mortgage transaction.

36 Am. Jur., 751, Sec. 128.
Hall v. O'Connell, 52 Or. 164, 95 Pac. 717.
Conley v. Henderson, 158 Or. 309, 75 Pac. 2d 746.

It is the rule that *any doubt* as to the character of the transaction should be resolved in favor of a mortgage transaction.

Conley v. Henderson, supra;
Harmon v. Grants Pass Banking Co., 60 Or. 69;
Ringer v. Virginia Timber Co., 213 Fed. 1001.

The facts in this case come squarely within the principles recognized and applied in the following cases:

Stanley Dollar et al. v. Land, Chairman, United States Maritime Commission, 184 F. 2d 245, cert. denied, 340 U.S. 884;
Hall v. O'Connell, 52 Or. 164, 95 Pac. 717;
Umpqua Forest Industries v. Neenah-Oregon Land Co., 188 Or. 605, 217 Pac. 2d 219;
Harmon v. Grants Pass Banking & Trust Co., 60 Or. 69;
Conley v. Henderson, 158 Or. 309, 75 Pac. 2d 746, regarded by the Oregon Supreme Court as the leading case on the subject;
Ringer v. Virgin Timber Co., 213 Fed. 1001.

The pertinent facts and excerpts from the decisions in these cases are set forth in the Appendix, pages 1 to 8.

In 36 Am. Jur. 751, Section 128, Title Mortgages, the text says:

> "Moreover, an instrument of conveyance intended to secure the performance of an obligation, although not in the form of a mortgage, may be interpreted as constituting the obligor a mortgagor even though the obligor is not a party to the conveyance, where, at the time thereof, he had a mort-

gageable interest in the property or, by virtue thereof, acquired such interest and, by his act or assent, procured the execution of the conveyance to the grantee therein. Thus, it has been adjudged that where one who has a contract for a conveyance of land procures the execution of the deed to another as security for a debt, the transaction constitutes a mortgage.

. . . . .

"Sec. 143. Effect of lack of Identity Between Grantor and Obligor.—An instrument of conveyance intended to secure the performance of an obligation, although not in the form of a mortgage, may be interpreted as constituting the obligor a mortgagor even though the obligor is not a party to the conveyance, where, at the time thereof, he had a mortgageable interest in the property or, by virtue thereof, acquired such interest, and by his act or assent procured the execution of the conveyance to the grantee therein. In such case, parol evidence is admissible to show that the transaction was intended as a mortgage; the rule that a deed absolute on its face may be shown by parol to be a mortgage does not generally depend for its application on the circumstance that the grantor in the deed and the alleged mortgagor are one and the same person. Thus, it may be proved by parol that a deed was given to the grantee therein, not to vest in him the full title, but to secure the repayment to him of sums he had advanced to a third person to be used by such third person in purchasing for himself the property conveyed."

The facts in the case at bar are in the essential particulars the same as in the cases just cited. The true character of the transaction must be determined without regard to the language of the contract which purports to make the Lumber Company a purchaser of the property and the owner thereof. "We must look at the essential

nature of the transaction and not play upon phrases" (*Dollar* case). Here, too, the Logging Company submitted to the type of security demanded or required by the lender, namely, the transfer of the title purchased in part with money "advanced" by the lender and the transfer of title to the borrowers' own property, so that legal title to all of the property was vested in the lender instead of the usual procedure of giving a mortgage to secure the loans.

Here, too, the transaction was devised and the documents drawn by Mr. Neal, an able lawyer of a prominent Tacoma law firm, who was himself interested in the Lumber Company. He was the president thereof and executed all three contracts on behalf of the Lumber Company.

In *McPherson v. Hayward,* 17 Atl. 164, 165 (Me.), the Court held:

> "Where one has a contract for a conveyance of land to him and procures another to complete the payments for him, and such other person does so and takes the deed in his own name as security for his advances, the transaction constitutes a mortgage of the land between the parties. Stoddard v. Whiting, 46 N.Y. 627; Carr v. Carr, 52 N.Y. 251; Houser v. Lamont, 55 Pa. St. 311; Smith v. Cremer, 71 Ill. 185."

In *Campbell v. Dearborn,* 12 Am. Rep. 671, 682 (Mass.), the Court held:

> "In the present case, we are able to arrive at the clear and satisfactory conclusion that there was no real purchase of the land by the defendant, either from Tirrill or from the plaintiff; that his advance of the purchase-money at the request of the plain-

> tiff created a debt upon an implied assumpsit, if there was no express promise; and that it was the expectation of both parties that the money would be repaid soon and the land reconveyed. Whatever may have been the intention of the defendant, he must have known that this was the expectation of the plaintiff; and it is most favorable to him to suppose that it was his own expectation also. These conclusions are not in the least modified in his favor by an examination of his answer."

Under these authorities there is no escape from the conclusion that the parties were mortgagor and mortgagee with all the legal incidents inherent in such relationship; that when the debt was paid in June 1950, the mortgagor-mortgagee relationship terminated; that the Lumber Company was not the owner of the property, but merely held the naked legal title in trust for the Logging Company or its "successors in interest" and when the Logging Company, and the Corporation thereafter, cut and removed timber therefrom, it was their own timber, being the equitable and beneficial owners thereof, and that all that remained of the contract (unless abandoned) was an option to purchase logs after they were cut at market price.

POINT II

The Court erred in rendering judgment against the Logging Company and the Corporation for the sum of $50,000.00, the value of logs alleged to have been removed by them. The Lumber Company was not the owner of the logs. They were owned by the Logging Company or the Corporation. The Lumber Company only had an option to purchase the logs at market price.

If the Court determines that the transaction, described in the contract under consideration, was a loan of money secured by a transfer of the title to the timber lands and contracts and that the relationship was that of mortgagor and mortgagee, then it follows, as a matter of course, that the Logging Company or its transferee, the Corporation, was the owner of the timber lands and the logs removed therefrom; that the Lumber Company was not the owner of the logs removed therefrom, and it merely had an option to purchase the logs at market price.

The mere fact that the Lumber Company held the naked legal title to the lands IN TRUST for the Logging Company, did not make it the beneficial owner of the logs as against the true owner. The logs were the property of the Logging Company or its successor, the Corporation, and in removing them, they violated no property right of the Lumber Company.

If the removal of the logs and the sale thereof to others constitutes a violation of the Plaintiff's option to

purchase the logs, it would only give rise to an action for damages and not for the value of the logs.

In *Caro v. Wollenberg,* 68 Or. 420, 136 Pac. 866, title was conveyed by deed as security for indebtedness and the grantee went into possession, the Court held that the deed which was in equity a mortgage, and

> "After a mortgagee has received payment of his debt, he really holds the property in trust for the mortgagor: 2 Jones, Mortgages, Section 1159."

In *Caro v. Wollenberg,* 83 Or. 311, 163 Pac. 94, involving the same transaction, the Oregon Supreme Court called attention to Section 335 L.O.L. (now Section 86.010 Oregon Revised Statutes), which provides as follows:

> " 'A mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law.' "

And the Court went on to say:

> "This section is an emphasis of the principle that a mortgage does not convey title."

This principle was applied in that case where a deed was held to be a mortgage in equity.

It is obvious that the Lumber Company was not the owner of the property conveyed to it as security, either before or after payment of the debt, and certainly had no beneficial interest therein after the indebtedness was paid in full long prior to the time of the alleged removal of the timber.

The Lumber Company cannot recover the value of the property it did not own as against the true owner thereof.

These Appellants adopt the argument in the brief of Appellant McKenney Logging Corporation under Point II, pp. 16 to 22.

POINT III

The Court erred in rendering judgment against the Logging Company and the Corporation in the sum of $118,000.00 for alleged loss of profits resulting from the alleged failure to furnish logs for the operation of the Batterson Mill.

(a) It was error to render judgment in favor of the Plaintiff and against the Appellants for the sum of $118,000.00 loss of profits resulting from the alleged failure to supply logs for the operation of the Batterson Mill because the contract only required furnishing of logs sufficient to operate the Batterson Mill on a *one shift* basis and the record establishes, by the Plaintiff's own witnesses, that the mill had sufficient logs to operate on a one shift basis during all of the time in question, and was actually operating during that time.

(b) Even if loss had been sustained, the Plaintiff is not entitled to recover the same for it is not the real party in interest. It had transferred the operation of the mill to Roy Gould (Diamond Lumber Company) under a contract by which Roy Gould was to have all of the profits from the operation of the mill and was to absorb all losses.

(c) There is no competent evidence that the Batterson Mill could have been operated at a profit.

(d) There was, in fact, no refusal to sell logs for the operation of the Batterson Mill. The Corporation offered to supply logs for the operation of the mill, but the Lumber Company and its transferee, Gould, attempted to impose conditions not warranted by the contract.

Re Alleged Loss of Profits

The only damages claimed and allowed in the Court below as a result of the alleged breach of the contract, was the loss of profit ($118,000.00) for failure to sell logs to the Lumber Company for the operation of the Batterson Mill.

The contract only obligated the Logging Company to supply logs sufficient to operate the mill on a *one-shift basis* (Tr. 134, subdiv. (d) and Tr. 135, subdiv. (a)). The testimony of Gansberg, the Lumber Company's Representative in charge of "procuring logs for the operation of the mill at Batterson," testified, unequivocally, that Plaintiff was able to get enough logs to operate the mill on a one-stift basis (Tr. 469-471).

It was conceded in the Court below that no damages were sustained if the Logging Company was only obligated to supply logs for a *one-shift operation*. On page 7 of Plaintiff's Supplementary Brief, submitted in the Court below, Plaintiff's Counsel said:

> "Plaintiff concedes that if the sole duty of defendant partnership under the contract was to supply

sufficient logs for a one-shift operation, no damages were sustained during this period, because it is not contended that plaintiff was compelled to pay a premium price to Nehalem and Smith & Wright, nor does plaintiff contend at this time that any logs have been taken from property subject to the Buffelen-McKenney contract since January 16, 1952."

This point is discussed and the evidence pertaining thereto is referred to in Point IV, pp. 24 and 25 of the Brief of Appellant McKenney Logging Corporation.

The argument is hereby adopted by the Appellants Glaser & Glaser.

Re Real Party in Interest

Since the Lumber Company transferred the operation of the mill to Gould under agreement that Gould was to have the profits and absorb the losses from the operation of the mill, the Lumber Company cannot, in any event, have any recovery, whether of profits or losses.

Appellants Glaser and Glaser adopt the argument under Point V, p. 26 of the Brief of McKenney Logging Corporation, which presents this contention.

We merely wish to supplement the argument by reference to the following testimony which bears on the question as to whether Plaintiff sustained any damage from the alleged failure to supply logs. Roy Gould, who operated the mill after October 1, 1951, under the contract that he was to receive all the profits and sustain all losses from the operation of the mill, testified that he

bought logs for the operation of the mill from other operators (Tr. 221). (He did not testify that he had to pay any more for the logs than he would have had to pay to the Lumber Company or the Corporation.) He attributed losses among other things to the "breaking in of new men and getting an organization started." He also testified (Tr. 221-222) that he bought logs from Yunker in October and November 1951 (Tr. 225), but did not testify to the payment of any increased amount.

Re Failure to Establish that Batterson Mill Could Have Been Operated at a Profit

The only evidence introduced by Plaintiff in support of its contention that it sustained loss from the failure to supply logs for the operation of the Batterson Mill, consisted of summaries or tabulations made up by Plaintiff's accountant for use upon the trial. They were admitted in evidence over objection of the Defendants and the admission of these summaries or tabulations is assigned as error. Without these summaries or tabulations, there is not a scintilla of evidence in the record to sustain a finding that the mill could have been operated at a profit on a one shift basis and the summaries, even if admissible, do not sustain such a finding.

The admissibility of these summaries (Exhibits 19-A, 19-B, and 19-C, and Exhibit 22), are discussed under Point VI, pp. 27 to 30 of the Brief of Appellant McKenney Logging Corporation and are also discussed in the Brief of Appellants McKenney and McKenney. Appellants Glaser and Glaser adopt the same arguments.

Re Alleged Refusal to Sell Logs

There was, in fact, no refusal by the Corporation, after it became the owner of the Logging Company's interest in the timber lands, to sell logs to the Lumber Company or to Gould, its transferee. Buol and Carr both testified that they went to Tacoma for the express purpose of arranging for the sale of logs to the Lumber Company (Tr. 353). Holm, the Lumber Company's Representative, testified (Tr. 258) that Buol and Carr told them that they came to Tacoma to sell them logs. The testimony of all of the witnesses, (Plaintiff's and Defendants') as to the conversations that took place on September 27th and 28th in Tacoma, shows that Buol and Carr went there to sell them the logs and that all of the discussions pertained to the manner and place of delivery, as well as the discussions as to the transfer of the mill to Gould, and that Buol and Carr were told that they would have to deal with Gould (See excerpts from testimony and discussions at pages 62 to 68 of this brief).

POINT IV

The Court erred in holding that there was a breach of the contract by reason of the sale by the Logging Company of its interests in the timber lands and contracts to the Corporation without the written consent of the Lumber Company.

It is, of course, true that the Lumber Company did not give its "written"consent to the transfer of the Logging Company's interest in the timber lands to the Corporation.

But it does not follow that the making of the transfer without such "written" consent constitutes a breach of the contract resulting in a forfeiture of the Logging Company's timber lands to the Lumber Company or that the transfer constituted a breach of the contract at all for the following reasons:

(a) The contract does not provide for any forfeiture in the event of sale without the written consent of the Lumber Company;

(b) The Lumber Company did not object to the sale and acquiesced therein;

(c) The transfer, without written consent, is not the real basis of this action.

(d) No damage resulted from the failure to obtain the "written" consent prior to the transfer to the Corporation because the Corporation was willing to recognize the option to purchase logs and to sell logs to the Lumber Company on the terms of the contract.

A.

While the contract contains a provision prohibiting transfer of the timber lands without the "written" consent of the Lumber Company, it is *not coupled with any provision for any forfeiture* or other penalty.

It is well settled that a provision prohibiting assignment of a contract without written consent, creates no forfeiture in the event of a violation of the provision. It merely gives the party to the contract the privilege of rejecting the assignee and may be waived expressly or impliedly by the conduct of the parties and by acquiescence in the transfer.

In *Nielsen v. Baldridge,* 173 Or. 555, 567, 146 P. 2d 754, the Oregon Supreme Court held:

> "The contract, although affording the plaintiff the privilege of rejecting assignees, contained no provision which forfeited the contract in the event of an unauthorized assignment."
>
> . . . . .

The Court then quotes from *Johnson v. Eklund,* 72 Minn. 195, as follows:

> " 'It will be noted that there is no provision that an assignment without Eklund's written approval should forfeit the contract, or give the vendor the right to declare it forfeited; and certainly the courts will not read any such right into the contract by implication. There is nothing personal in the nature of the contract. All that the vendor was interested in was the payment of the purchase money at maturity. If he received this, it was wholly immaterial to him who paid the money or who got the land. At most, this stipulation against an assignment is *merely collateral* to the main purpose of the contract, designed as a means of securing an enforceing performance of what was undertaken by the vendee, to wit, the prompt payment of the purchase money. When the vendor has received all his purchase money, he has received all that he is entitled to, and all that the provision against an assignment was intended to secure. Under such circumstances, the fact that the assignment to plaintiff was not countersigned by the vendor is no defense to an action by her to compel a conveyance.' " (Emphasis supplied)
>
> . . . . .
>
> "The following, said in Griff v. Landis, 21 N.J. Eq. 494, is much quoted:
>
> " 'But I apprehend such collateral covenant will never be thus enforced, where it appears upon the face of the contract that the prohibition to assignment is *not the main purpose of the covenant, but*

> *a mere incident to a security for such purpose.* It is the province of a court of equity to ascertain what is, in truth, the real intention of the parties, and to carry that into effect.
>
> . . . . .
>
> "We know of no reason whatever for not applying in this suit the principles which controlled the cases from which we have just quoted. The contract before us has not been terminated." (Emphasis supplied)

Under these principles, it is clear that the mere failure to obtain the written consent of the Lumber Company to the transfer of the Logging Company's interest in the timber lands to the Corporation, did not vest any title to the timber lands in the Lumber Company or create in it any property right or in any way affect the beneficial ownership of the timber lands in the Logging Company or in its successor, the Corporation.

Since the non-assignment provision was merely collateral to the option to purchase logs and since the Corporation was willing and offered to sell logs to the Lumber Company on the terms of the option, the Lumber Company did not object to the Corporation becoming the purchaser, the failure to obtain in advance the "written" consent did not constitute a breach of the contract.

The only remedy available to the Lumber Company for the transfer of the property without its written consent, is an action for damages if it sustained any by reason of the transfer, provided, of course, it had not waived the requirement or acquiesced in the transfer by its conduct.

The record establishes that the Lumber Company did not object to the transfer of the timber lands by the

Logging Company to the Corporation when informed thereof; that it acquiesced in the transfer; that it undertook to transact business and was willing to transact the business contemplated by the contract with the Corporation. The failure to obtain the written consent was never asserted by the Lumber Company as a breach prior to the commencement of this action and is not the real foundation for this action.

The transfer by the Logging Company to the Corporation was made in the early part of September 1951. The Lumber Company became aware of the transfer on September 27, 1951, when Buol and Carr (the Corporation) went to Tacoma and informed Pohlman and other officers of the Lumber Company, that they purchased and had become the owners of the Logging Company's interest in the timber lands and timber contracts. Conversations were had between Buol and Carr (the Corporation) and Pohlman and other representatives of the Lumber Company, including its attorney and president, on September 27th and 28th.

There is no evidence in the record that anyone on behalf of the Lumber Company objected to the transfer during those conversations or that the Corporation would not be recognized as the transferee or that the Lumber Company would refuse to do business with the Corporation.

On the contrary, the discussions that took place, clearly indicate a willingness to recognize and do business with the Corporation as the successor to the Logging Company and many subjects were discussed on the assumption that the Corporation would be so recognized.

Edward M. Buol testified that after the Corporation acquired the Logging Company's interest in the timber, he and Carr, who constituted the Corporation, went to Tacoma on September 27, 1951, and talked to Pohlman and Holm, officers of the Lumber Company (Tr. 328). They first talked about purchasing the Batterson Mill. They were told that a deal had been made with Gould (Tr. 329). They offered to sell the logs to the Lumber Company. Pohlman told them that Gould was taking the mill and that they would have to deal with Mr. Gould and make arrangements with him to sell the logs to him (Tr. 330). They discussed four rafts of logs which were in process of completion about ready for delivery. They were told that

> ". . . we would have to deal with Mr. Gould; he would be the man that would buy the logs." (Tr. 331)

At that conversation, Pohlman read the contract to Buol and Carr (Tr. 337). At the conversations that took place on September 27th and 28th, Buol and Carr were requested to put logs in the mill at Batterson (Tr. 339).

Carr testified that at that conversation, he told Pohlman that they had taken over the McKenney Logging Company and some arrangements could be made to buy the mill or take it over (Tr. 350). Pohlman told him that they had made arrangements with Gould and that Gould would take care of things from then on (Tr. 350). He was asked whether they knew of the contract with the Logging Company and when he said that he had never seen it, Pohlman got the contract and read it to him. Carr said that the contract wouldn't make any dif-

ference because he intended to sell them the logs and told him that he had four rafts that were in the course of completion (Tr. 351). Pohlman told him that Gould would be buying the logs and they had turned the whole business over to Mr. Gould (Tr. 351). Pohlman asked them to go up and see Mr. Neal, the attorney and president of the Lumber Company. *Carr testified that no objection was made at that time to their taking over the Logging Company's holdings* (Tr. 352). At that conversation, they discussed the matter of making out invoices and Carr told Mr. Holm that they would make out the invoices instead of the invoices being made out by the Lumber Company as was theretofore done (Tr. 352). Holm told Carr that that would be a good arrangement,

"much better than what they had." (Tr. 352)

Pohlman and Holm made arrangements for Buol and Carr to meet with Gould and they did meet on the following day (Tr. 353). Gould said he was going to operate the plant and open it up pretty soon and was going to take on all of the logs they had *and wanted them dumped in the Batterson Mill pond*. This conversation was in the presence of Holm and Pohlman. Carr told Pohlman at that time,

> " 'That doesn't make any difference to us where you want them. We don't care.' I says, 'I want to sell you logs as long as you pay for them.' I says, 'I don't care where you deliver them or where you want them put. We don't care.' " (Tr. 353)

They then discussed the rafts which were then being made up in the river and he was told by Holm and

Gould that they could go ahead and complete the rafts that were in the river, but *they didn't want the rafts that were in the river* (Tr. 354). He offered those rafts to them at the time as he wanted to go on doing business with them (Tr. 355). Gould said he didn't want raft 46-M because it was in the river. Gould told them to go ahead and sell the raft (T. 355). This was not denied. The conversation of the 28th of September was held at the office of Mr. Neal, the attorney and president of the Lumber Company. Mr. Neal inquired as to who was the attorney for the Corporation. He was told, he was Mr. Tracy Griffin and Mr. Neal told them,

> " 'We won't have any trouble getting together on this . . . . . 'I will call Tracey up or Tracey can call me up, or vice-versa,' he says, 'and we will get together.' " (Tr. 357)

Carr asked Mr. Neal,

> " 'Well, what should we do in the meantime?' He says, 'just go on like you are. You will hear from us in a day or two.' (Tr. 358)

He never heard from Mr. Neal thereafter.

Mr. Frank C. Neal, the Lumber Company's president and attorney, testified with respect to that interview that he inquired as to who the lawyer for the Corporation was; that he learned it was Mr. Tracey Griffin, and then testified:

> "Q. What, if anything, did you say when they told you who their lawyer was?
>
> A. I said I had known Tracy Griffin well for many years, and if Tracy Griffin was their lawyer I was sure that he and the lawyer for Mr. Gould, with whom I was in touch at that time and in

negotiations, could easily work out all the angles of their trouble." (Tr. 381)

He testified that he was representing the Lumber Company; that Andrew Koerner was representing Mr. Gould and when asked the purpose of having the conference between the three, he answered:

> "Because in my opinion a harmonious relationship between all the parties was very essential, and *the idea was to arrange for the consent by Buffelen Manufacturing Company, to consent to the taking over by the new people of the McKenney contract, and also at the same time to obtain the consent, the written consent, of the new people as assignees of the McKenney people to the taking over of the other contract by Mr. Gould* on whatever conditions were brought up at that time." (Emphasis supplied)

After that conversation, further conversations were had between Buol and Carr and Gould at the mill in reference to the delivery of logs, the manner of storing and payment therefor.

Pohlman testified that on the first day of that interview, he made arrangements for Buol and Carr to meet Gould; that he told Buol and Carr that Gould would operate the mill after October 1st and that *Gould would tell them what logs to dump in the pond.* Pohlman pointed out that if the deal with Gould went ahead,

> "the thing that would make a success of any operation would be cooperation between the logger and the mill operator."
>
> "Q. If you did eventually sell it, would you be concerned about the relations between *Gould and Buol and Carr?*
>
> A. Yes, we would.
>
> . . . . .

Q. Did you tell *Mr. Buol and Mr. Carr* that Mr. Gould was going to operate the mill after October 1st?

A. That is correct.

Q. Who was to tell *Mr. Buol and Mr. Carr* what logs were to go in the pond and what logs were not to go in the pond?

A. Mr. Gould." (Tr. 375) (Emphasis supplied)

Pohlman complained about some former delays in invoicing the rafts. The matter was discussed and he testified:

"Mr. Carr assured him (Holm) at that time that as soon as they took over and got into this thing this thing would not occur again; that the way they operated they would issue invoices promptly." (Tr. 376)

Mr. Holm, the representative of and witness for the Lumber Company, testified that prior to October 1st, he had already talked to *Buol and Carr about selling the logs to Gould* and that it was their intention to sell the mill to Gould (Tr. 225). He testified that he *told Buol and Carr where to dump logs* at the interviews of September 27th and 28th (Tr. 257-258). He also testified that at that conversation, *Buol and Carr told them that they came to Tacoma wanting Buffelen as a customer* (Tr. 258).

"Q. At that time you testified that you informed them to dump logs in the millpond?

A. Yes, that is right." (Tr. 259)

Roy Gould, the party to whom the Lumber Company intended to sell the mill and who operated the mill after October 1st, testified as a witness for the Lumber Company that he met with Buol and Carr on September

28th in conjunction with Pohlman and Holm; that he discussed the supply of logs with Buol:

> "Everything was very harmonious. He agreed that he would promptly start supplying the mill with logs." (Tr. 229)

He then testified that Pohlman and Holm told Buol and Carr that he was about to purchase the Batterson Mill.

> "Q. And that they should sell the logs to you if you purchased the mill; is that right?
>
> A. That is right; that they would keep the contract on the timber and be responsible for it in every way and the contract would carry on regardless of whether I bought the mill or not." (Tr. 230)

At the conversation of September 27th, Buol and Carr agreed to deliver logs (Tr. 232).

No one testified on behalf of the Lumber Company that any objection was ever made orally or in writing to the transfer of the Logging Company's interests in the timber lands to the Corporation.

There is direct testimony by Carr (uncontradicted) that no such objection was ever made.

The foregoing specific testimony, and the record as a whole, demonstrates very clearly that the controversy does not arise out of the fact that a written consent to the transfer was not obtained prior to the transfer; that the Lumber Company and Gould acquiesced in the transfer and carried on negotiations which are consistent only with such acquiescence. It included agreements which could only be made upon the recognition of the Corporation as the assignee, such as agreements for the

delivery of logs to Gould and agreement as to where logs were to be dumped, and so forth.

The testimony of Mr. Neal is of the highest significance. It demonstrates that it was contemplated that the transfer would be confirmed by subsequent written consent not only as to the transfer from the Logging Company to the Corporation, but also the sale of the mill by the Lumber Company to Gould. There was to be reciprocal consent affirmative of what had already been done and it is obvious that the failure to obtain the written consent to the transfer prior thereto, was not deemed to be and, cannot now, be retroactively treated as a breach of a contract.

The controversy does not stem from the failure to obtain the written consent. It stems from a misunderstanding between the parties as to who was to pay for the logs that were to be delivered to Gould. The Corporation was concerned over this matter of payment and who was to make the selection of logs. They believed that it was the intention of the Lumber Company that the Corporation should look to Gould for payment of the logs. They believed him to be under-financed and were reluctant to accept Gould as the obligor (Tr. 331).

It was while this misunderstanding was being looked into and before any attempt to resolve it was made, that this law suit was commenced on October 15, 1951 (Tr. 6).

Under these circumstances, the failure to obtain the "written" consent to the transfer, cannot be treated as a breach of the contract.

POINT V

The Court below erred in holding that the Lumber Company had a subsisting option to purchase logs from the Logging Company's timber lands at the time of the alleged breach. The record establishes that the Lumber Company had, in fact, abandoned the purpose of the contract.

In September 1951, at the time of the alleged breach, the Logging Company had paid to the Lumber Company, in full, all of the indebtedness, including the interest thereon.

As a matter of law, the Lumber Company's interest as mortgagee in the said timber lands had terminated in June 1950 when the loans were re-paid.

The question remains, did the Lumber Company have a subsisting option to purchase logs thereafter?

We submit that the record establishes clearly that the purpose of the contract, insofar as it involves the option to purchase logs, had been abandoned by the Lumber Company.

The contract in question has three parts:

(a) Conditions to be performed by the Lumber Company;

(b) Conditions to be performed by the Logging Company;

(c) Mutual agreements.

The contract, insofar as it provides for an option to buy logs, is found in subdivision (e) of the Logging Company's obligations (Tr. 134), as follows:

"(e) To give to the Lumber Company at all times the first right and option to purchase the *entire output* of the Loggers at the market price for the mill pond price as herein provided." (Emphasis supplied)

And in the mutual covenants (Tr. 135), which provides:

"(a) That the Lumber Company has constructed its sawmill at Batterson in full reliance upon the agreement on the part of the Loggers or their *successors in interest* to provide the logs needed to keep the Lumber Company mill in continuous operation on a one shift basis and in the further reliance upon the agreement on the part of the Loggers to give the Lumber Company the *first right or option* to purchase at the market price, as herein defined, *all* of the merchantable fir timber coming from the lands either owned or controlled by the Loggers or by the Lumber Company *for use in its plant at Tacoma or for use in its sawmill* at Batterson." (Emphasis supplied)

The record establishes an abandonment of the option and purposes of the contract for the reasons:

(1) The Lumber Company did not elect to purchase "all" or "the entire output of the Loggers." The evidence establishes that only about 50% of the Logging Company's output was purchased by the Lumber Company.

(2) The Lumber Company did not purchase any peeler logs or other logs for the Tacoma plant.

(3) A substantial part of the logs that were actually purchased, were not for use in the Tacoma or Batterson Mills, but was sold or traded by the Lumber Company for lumber.

(4) The Lumber Company's transfer of the mill for operation by Gould subjected the Logging Company or its successor to the imposition of conditions in reference to the selection of logs, place of loading, and delivery, by Gould instead of the Lumber Company and for purposes other than contemplated by the contract.

We respectfully invite attention to the following testimony:

Holm, the Lumber Company's Representative, testified (Tr. 181), that in conversation with McKenney, he said:

> "We want all the logs that were produced . . . . .
> Q. Was that all logs or all *saw* logs?
> A. All *saw* logs." (Emphasis supplied)

This, of course, excluded the peeler logs.

At Transcript 187, he testified:

> "Q. Do I understand correctly, then, that you purchased logs that were put in the river and *sold those logs to other persons?*
> A. That is right, *on a trading basis.*
> Q. Would you explain that further?
> A. Yes. It is the practice for mills that only use part of the materials out of the logs to trade them to mills to get the materials that they will need or what the logs will produce. Rather than ship all the commons to Tacoma, we tried to *put the logs into different mills* and receive the shop or peelers, *or whatever we might use, for trading purposes.*
>
> . . . . .
>
> Q. In other words, you were dealing in logs, then, on the Columbia River in the year 1951?
> A. Well, I don't know how you put that dealing in logs. We were buying McKenney's logs and

turning them over to one of our people that furnished shop lumber for us at Tacoma.

Q. Who was it you turned the logs over to?

A. Columbia River Paper Mills.

Q. You sold those logs to the Columbia River Paper Mills?

A. That is right.

Q. Now, you received in exchange peelers for them?

A. Some peelers and some shop lumber." (Tr. 188)

. . . . . .

"A. Why was it that on May 22nd you directed Mr. McKenney to dump all sawmill logs at Batterson?

A. To what?

Q. To dump all sawmill logs.

A. At Batterson?

Q. At Batterson.

A. I didn't do that on May 22nd.

Q. What did you tell him to do?

A. I told him that we wanted all the sawmill logs that he was hauling to the river.

Q. Where did you want them?

A. Well, we were going to take them at the river.

Q. You wanted them at the river?

A. Well, we would accept them at the river where he was dumping and rafting them.

Q. That was for the purpose of trading in those logs in the river?

A. That is right.

Q. And that was the sole purpose?

A. What is that?

Q. The sole purpose of requesting all logs after that date at the river was to trade those logs in the river?

A. For materials for our plant at Tacoma." (Emphasis supplied)

Mr. Bradeen, the Lumber Company's assistant manager, testified that in 1950 no logs were shipped to Ta-

coma. The rafts numbered 6-M to 16-M inclusive were unloaded at Batterson (Tr. 199).

Mr. Bevan, the Lumber Company's assistant log buyer, testified that they were buying peeler logs at Longview Washington, in 1950. No reason is assigned why they didn't buy peeler logs from the Logging Company.

James Chamberlain, the Lumber Company's assistant superintendent of the Tacoma plant, testified that in May 1951, they were taking some grades of logs at the mill at Batterson, but not all grades (Tr. 214); that the Lumber Company wanted logs for "trading purposes"; that all the logs could not be used at the Batterson Mill and Tacoma was not taking any saw logs, and that the purpose of purchasing logs that could not be used at the Batterson Mill was

> "to be traded for products that we needed." (Tr. 217)

Glaser testified (Tr. 320) that the reason they sold raft 44 was that it was a "peeler raft" and

> "up to that time, why, Buffelen had not been interested in peelers . . . . . They were not interested in peelers in the Columbia River at that time. They had not been since—well, they never had bought any peeler rafts out there." (Tr. 320)

The evidence also establishes that upon the transfer of the mill to Gould, that *he* was to determine what logs would be taken; that is to say, he would exercise the option; that it would be his choice or selection and not that of the Lumber Company for the specific purposes contemplated by the contract. Gould himself testified

that it was his intention to utilize the logs in part for the Batterson Mill and in part for his own mill located at Tillamook. He also wanted all logs without segregation into peelers (which have a higher market price) and saw logs. The peelers would have to be cut up into saw logs because there was no plywood mill at Batterson. This arrangement introduced new conditions affecting the market price of the logs and the selection of logs and other factors affecting the profitable disposition of the logs.

This course of procedure is wholly at variance with the purpose expressed in the recitals in the contract and in the contractual provisions.

It is also apparent from the record that while it was contemplated that the Batterson Mill should have a continuous operation, its operation was spasmodic and it had many shutdowns and was shutdown entirely from June 29, 1951, to October 1, 1951.

We submit that this course of conduct on the part of the Lumber Company constitutes an abandonment of the purposes contemplated by the contract and of the option to purchase "all" or "entire output" of the logs. The Logging Company was justified in its belief that the Lumber Company had abandoned the option after the shutdown of the Batterson Mill for three months.

This was a reasonable belief because the *contract did not specify any particular times or periods in which the option was to be exercised, or to what extent it would be exercised in a given period,* with the result that the Logging Company could find itself, and did at times

find itself, with large inventories of logs without knowing when, if ever, the Lumber Company would elect to buy them. Certainly, after a lapse of more than two years in failing to purchase logs for the Tacoma mill, the Logging Company had a right to assume that the purpose of the contract had been abandoned, at least, to that extent.

POINT VI

The Court below erred in granting equitable relief because the case presents no ground of equitable cognizance. The plaintiff had an adequate remedy at law for a breach of the contract, if any there be.

The contract has two distinct phases: (a) a loan secured by conveyances of property which are, in legal effect, mortgages, and (b) an option to the Lumber Company to purchase logs from the Logging Company at market price.

The first phase of the contract terminated when the loans were paid off. The Lumber Company ceased to be a mortgagee in equity and, thereafter, held the naked legal title to the property IN TRUST for the Logging Company.

There remained only the phase of the contract which gave the Lumber Company the option to purchase logs.

That option to purchase logs after the timber was cut and made into logs (personal property) *created no property right,* either in the lands from which the timber was to be cut, or in the timber standing thereon, or in the logs cut therefrom.

James on Options, Sec. 502, p. 200, says:

> "No interest in land is acquired until the optionee exercises his right to purchase, and a provision that the option shall be a covenant running with the land does not alter the rule."

The writer illustrates the principle as follows, p. 201:

> "Thus, where the lessor of a brick yard leases the same reserving as rent a certain sum on every thousand bricks manufactured by the lessee, and the lease giving him the option, from time to time, to take, at the kiln, at the market price, such quantity of bricks as should be equivalent to the sum named as rent, the lessor had no property in the bricks till he made his election." (Citing Appeal of Wait, 24 Mass. 100.)

An option is not a contract at all. It is merely an offer and does not ripen into a contract until acceptance.

An option without consideration, like any other offer, may be withdrawn before acceptance.

An option given for a consideration, is merely an agreement to keep the offer open for a stipulated period of time. It creates no property right or interest in the property which is the subject matter of the option. When the owner of the property disposes of it in violation of an option to purchase, it can only result in a cause of action for damages, if any there be, for failure to keep the option open for the stipulated period of time. Since the holder of an option has no interest in the property, a Court of Equity is without jurisdiction to restrain the owner from selling the property.

In the case at bar, assuming that the Lumber Company had a subsisting option to purchase logs, a Court

of Equity could not *enjoin* a sale of the Logging Company's equitable interest in the timber lands by the Logging Company and it certainly had no jurisdiction to cancel a sale of the property *after* a sale is consummated.

The remedy of the optionee would, in any event, be limited to the recovery of damages for failure to keep the option open. *This is an adequate remedy at law.*

In *Herndon v. Armstrong,* 148 Or. 602, the Oregon Supreme Court held that an option to purchase property

> "created no interest in the property described in the contract."

In *The Texas Company v. Butler, et al.,* 198 Or. 368, 256 Pac. 2d 259, the Court held:

> "Such a contract (option to purchase) does not pass to the optionee, so far as the option alone is concerned, any interest in the land until a valid election to buy has been made, in accordance with the terms of the option, which then changes the character of the parties from optioner and optionee to vendor and purchaser. *Herndon v. Armstrong,* 148 Or. 602, 608, 36 P. 2d 184, 38 P. 2d 44; *Richanbach v. Ruby,* 127 Or. 612, 630, 271 P. 600, 61 A.L.R. 1441; *Strong v. Moore,* 118 Or. 649, 245 P. 505."

In *Kingsley v. Kressly,* 60 Or. 167, 111 Pac. 385, 118 Pac. 678, the Oregon Supreme Court held that an optionee to purchase property, even when the option is for a valuable consideration,

> "would acquire no right in the property."

Assuming, without admitting, that the sale of the timber lands by the Lumber Company to the Corpora-

tion, constituted an interference with Plaintiff's option to purchase logs, it would not warrant the exercise of equity jurisdiction because the Lumber Company would then have an *adequate remedy at law* for such interference, assuming that it suffered damage.

The sole consequence that would result from the failure to keep the option open, if it be a fact, would be that the Lumber Company would have to purchase logs elsewhere and perhaps be required to pay more than the market price, which was the basis of the purchase price under the contract, and the diffierence would be the measure of damage recoverable in an action at law.

In *Sweeney v. Smith,* (cited and discussed in the Brief of Appellant McKenney Logging Corp., pages 8 to 11), a case involving the unlawful inducement to breach a contract for the sale of securities, the District Court held:

> "It will also be observed, in the examination of the cases referred to, that, where an actionable wrong has been suffered by unlawful interference with a contract, the form of action to redress the injury is a suit at law. The proceeding here is in equity, and, while it is not necessary (if I am right in what I have heretofore said) to decide that the complainant has an adequate remedy at law, it may not be improper to add that this ground of demurrer by Smith & Co. would deserve serious consideration if it required decision."

In *Strong v. Moore,* 105 Or. 12, 207 Pac. 179, the Oregon Supreme Court held:

> "An option confers a privilege or right to elect to buy, but it does not impose any obligation to buy. (Citing cases.)

> "An option does not pass to the optionee any interest in the land . . . . . and therefore a person appearing in the character of an optionee possesses nothing except the right to elect to buy, and he has no interest in the land until by his acceptance of the option he transforms the option into a contract of sale and changes his character from that of an optionee to that of a vendee." (citing cases)

In *Leadbetter v. Price,* 103 Or. 222, 202 Pac. 104, the Oregon Supreme Court held:

> "It is only after the optionee has made an election under the terms of the option agreement, and within the time limited thereby, or by the law, where no time limit is fixed by the agreement, that an executory contract of sale result, of which a *court of equity will require the specific performance.*" (Emphasis supplied)

In the case at bar, there was only an outstanding option to the Lumber Company to purchase logs (assuming that it had not been terminated). The option had not been converted into a contract by an election to exercise the option. The contract contemplated election in the future as and when logs were produced. Hence, there was no property right enforceable by suit in equity.

The decree, insofar as it cancelled the deeds (Tr. 96) was clearly erroneous for want of equitable jurisdiction. The bare option to purchase logs in the future, which in the very nature of things could only be exercised in the future as and when logs were produced, would not authorize a decree in equity cancelling the conveyances from the Logging Company to the Corporation. This is particularly true because the Corporation recognized the

option when it was called to its attention and was at all times willing to sell logs to the Lumber Company on the terms of the option.

In James on Option Contracts, Sec. 1123, p. 536, the writer says:

> "An optionee may not maintain ejectment against the grantee of the option during the running of the option and before election, as no title or interest in the property passes to the optionee."

The decree cancelling the conveyances are, in legal contemplation, analogous to a judgment of ejectment referred to in the text. It accomplishes the same purpose and cannot be sustained because of the lack of a property right in the optionee.

In Section 1126, p. 541, the same author, in dealing with the subject of equitable remedies available to an optionee, says:

> "When it appears from the bill the agreement under which an option on mineral rights is claimed is not mutual so that specific performance will not be decreed against the optionor, the optionee is not entitled to an injunction to restrain the optionor from selling the mineral rights to a third person . . . . ."

Here, again, is reaffirmance of the principle that the holder of a bare option, which has not ripened into a contract by acceptance or the exercise of the option, has no standing in a court of equity and that if the optionor has, in violation of the terms of the option, parted with the property which is the subject matter of the option, the only remedy would be at law for damages.

It is, of course, elementary that equitable remedies will not be available where there is a lack of mutuality. This is, of course, true in the case at bar because the Lumber Company was not obligated to buy the logs. It merely had an option to purchase. The Logging Company could never have compelled the Lumber Company to buy and its failure to exercise the option at any time with respect to any part of the logs, would not have resulted in any cause of action in favor of the Logging Company. There was obviously a lack of mutuality, which is the first pre-requisite to the allowance of equitable remedies.

CONCLUSION

For the reasons herein and in the brief of the Appellant McKenney Logging Corporation, the judgment and decree must be reversed and the complaint dismissed.

Respectfully submitted,

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APPENDIX

In *Stanley Dollar, et al. v. Land, Chairman, United States Maritime Commission,* 184 F. 2d 245, certiorari denied, 340 U.S. 884, (a case with which this Court was also concerned) the plaintiffs transferred capital stock of the corporation to the Maritime Commission. Plaintiffs claimed that the stock was transferred as security for loans. The Maritime Commission claimed that the transfer was absolute in satisfaction of plaintiff's obligations to the Maritime Commission. The Commission realized more than enough to pay the loans in full from the operation of the corporation's steamships. The District Court held the transaction to be an absolute transfer. The Court of Appeals, reversed that decision, and held:

> "Because of the power which a creditor has over his debtor, especially a distressed debtor, equity views with considerable skepticism claims by the creditor of rights beyond the right to security and repayment. Pomeroy states the matter thus:
>
> " 'This doctrine is based upon the relative situation of the debtor and the creditor; it recognizes the fact that the creditor necessarily has a power over his debtor which may be exercised inequitably; that the debtor is liable to yield to the exertion of such power; and it protects the debtor absolutely from the consequences of his inferiority, and of his own acts done through infirmity of will. The doctrine is universal in its application, and underlies many special rules of equity.'
>
> *"Equity tends strongly to treat as mortgages or pledges transactions* between debtors and creditors relating to property of the debtors; even conveyances absolute on their face may be treated as

mortgages if in fact they were security for and not satisfaction of the debt. Pomeroy, citing many cases, describes the 'general criterion * * * established by an overwhelming consensus of authorities,' 'the practical test,' 'the sure test and the essential requisite.' This criterion is the continued existence of the debt. Pomeroy says: *'If there is an indebtedness or liability between the parties,* either a debt existing prior to the conveyance, or a debt *arising from a loan made at the time of the conveyance,* or from any other cause, and *this debt is still left subsisting,* not being discharged or satisfied by the conveyance, but the *grantor is regarded as still owing and bound* to pay it at some future time, so that the payment stipulated for in the agreement to recovery is in reality the payment of this existing debt, then the whole transaction amounts to a mortgage, whatever language the parties may have used, and whatever stipulations they may have inserted in the instruments.' "

. . . . .

"Here again we must look at the essential nature of the transaction and not play upon phrases." (Emphasis supplied)

In Oregon, it is well settled that transactions of this character are deemed to be mortgages, and that the rights and liabilities of the parties are governed by the principles applicable thereto.

The rule is the same *where the borrower is the owner of the property conveyed to the lender* as it is where property is being purchased in whole or in part with money advanced by the lender and the granter conveys title directly to the lender.

In *Hall v. O'Connell,* 52 Or. 164, 95 Pac. 717 plaintiff entered into a contract with one Mrs. Schetter to

purchase from her certain real property. He was unable to make the payment of the purchase price. Defendant advanced the money with which to pay the purchase price and by agreement between plaintiff and defendant, Mrs. Schetter executed the deed to the property, naming the defendant as grantee. Thereafter, plaintiff tendered to defendant the repayment of the purchase price. Defendant refused to accept the same and asserted ownership to the property. Plaintiff brought the suit to declare the deed to be a mortgage. The Trial Court rendered a decree in favor of the defendant, but the Supreme Court reversed the decree and held:

> "a deed absolute on its face given as security for the repayment of a loan may be shown by parol to be intended in fact as a mortgage. This has been frequently so decided by this court, beginning with *Hurford v. Harned,* 6 Or. 362. But it is urged by the defendant that this is a purchase by defendant with his own money and a conveyance to him from the vendor and not from the plaintiff, and therefore does not come within the above rule, and is within the statute of frauds. But as we understand, the rule that a deed absolute on its face, given as security, may be shown by parol to be a mortgage, applies equally to the case of a purchaser borrowing the purchase money, and causing the title to pass directly from the vendor to the creditor as security for the loan.
>
> "It is a question of the intention of the parties and not the form of words or of the instrument. If the equitable interest in the property is in the debtor, equity will protect him. In such a case, Jones, Mortgages, says, at section 331: 'The grantee in such case acquires title by his (the debtor's) act, and as security for his debt, and therefore holds the title as his mortgagee.' Also 27 Cyc. 979, says: 'If a

person who has contracted for the purchase of land procures another to lend him the money necessary to make the payments, or to advance it for him, and has the deed made to the latter, with an agreement that he will convey the title to the former on repayment of the amount advanced, the transaction will amount to an equitable mortgage, if it was the understanding and intention of the parties, that the one should become debtor to the other for the money advanced, and that the land should be held merely as security for his debt. If this was their contract, the form in which they may have cast the agreement is immaterial.'

. . . . .

" . . . So, when the fact is determined that the loan was made by defendant to the plaintiff, and that the deed was so taken as security therefor, then it is established that the purchase was made in defendant's name with plaintiff's money, and *when the debt is paid* defendant holds but the naked title without any beneficial interest, and is deemed the trustee of the title for the plaintiff. It is so held in many cases on this subject." (Emphasis supplied)

In *Umpqua Forest Industries v. Neenah-Oregon Land Company, et al.,* 188 Or. 605, 217, Pac. 2d 219, a case involving the question whether a transaction was a loan with security, the Court held:

"A deed absolute on its face may be shown to be a mortgage. The classic statement of the equitable principles underlying this rule is formulated by Pomeroy as follows:

. . . . .

" 'If the instrument is in its essence a mortgage, the parties cannot by any stipulations, however, express and positive, render it anything but a mortgage, or deprive it of the essential attributes belonging to a mortgage in equity.'

. . . . .

" 'This doctrine is based upon the relative situation of the debtor and the creditor; it recognizes the fact that the creditor necessarily has a power over his debtor which may be exercised inequitably; that the debtor is liable to yield to the exertion of such power; and it protects the debtor absolutely from the consequences of his inferiority, and of his own acts done through infirmity of will. The doctrine is universal in its application, and underlies many special rules of equity. * * *' Pomeroy's Equity Jurisprudence, Vol. 4, 5th Ed., § 1193."

. . . . .

"Our decisions establish that if the intent appears that property was conveyed and received as security for the fulfillment of an obligation, the form of the instrument becomes immaterial and the true nature of the transaction may be shown by parol evidence. Neither fraud, mistake nor accident need be proven. The primary inquiry relates to the intention of the parties at the time the transaction was consummated. *Harmon v. Grants Pass Banking & Trust Co.,* 60 Or. 69, 118 P. 188. Mutual intent is to be determined, not alone by the instruments executed, but also by the attendant circumstances and the conditions under which the instruments were delivered. The issue can be resolved only after considering the situation of the parties, the prices fixed relative to the value of the property and the conduct of the parties, both before and after the transaction, insofar as such conduct prospectively or retrospectively throws light upon the intent of the parties at the time of the transaction. (Citing many Oregon cases.)

. . . . .

"The use of the word 'advance' is most significant, ...

. . . . .

"The fact that negotiations originated out of an application for a loan tends to support the conclu-

sion that the deed given was intended as a mortgage.

. . . . .

"O'Neill and his company were certainly in straightened circumstances when he sought the loan and when he closed the deal on 6 February. It is established that *continued possession of property by the grantor is some evidence that the conveyance was intended as a mortgage.* 1 Jones on Mortgages, 8th Ed., § 402, p. 496; 5 Tiffany, Real Property, 3d Ed., § 1396, p. 263. The provision permitting the Plywood Company to log the tract during the period of purported option presents an analogous situation."

. . . . .

" ' . . . . evidence of a doubtful import will be construed in favor of the theory that a mortgage was intended, so that in such case a deed with a provision for a reconveyance will be construed as a mortgage rather than as a conditional sale. * * *' 36 Am. Jur., Mortgages, § 173, p. 776." (Emphasis supplied)

In *Harmon v. Grants Pass Banking & Trust Co.,* 60 Or. 69, the Court held:

"Based on these considerations, the rule has been established in equity that *where doubt exists* as to whether the deed evidences a conditional sale or a mortgage, the uncertainty will be resolved in favor of a conveyance designed as a security for the payment of money." (Emphasis supplied)

In *Conley v. Henderson,* 158 Or. 309, 75 Pac. 2d 746, a case in which the loan was made to enable the borrower to complete the purchase of the property and the title was conveyed to the lender, the Supreme Court, in determining that the transaction was a mortgage, held:

"It is a fundamental principle of equity that whenever a conveyance of land is given for the purpose of securing payment of an existing debt it is a mortgage. And whatever may be its form,

" 'If the instrument is in its essence a mortgage, the parties cannot by any stipulations, however express and positive, render it anything but a mortgage, or deprive it of the essential attributes belonging to a mortgage in equity.'

. . . . .

"As was said by Mr. Justice Story in Flagg v. Mann, 2 Sum. 486, 533 (Fed. Cas. No. 4,847):

" 'If a transaction resolves itself into a security, —whatever may be its form,—it is in equity a mortgage.'

"To the same effect is 1 Jones, Mortg. (8th Ed.), section 294. And, as stated by Pomeroy, in section 1237, 'the form is immaterial if the intent appears to make any identified property a security for the fulfillment of an obligation.' "

In *Ringer v. Virgin Timber Co.,* 213 Fed. 1001, the Clio Lumber Company was the owner of a sawmill and valuable timber lands which were subject to a mortgage. The mortgage was being foreclosed. The Lumber Company applied to a Company called Illinois Realization Company for a loan with which to pay off the mortgage loan. The Realization Company refused to make the loan, but arranged for a representative of that corporation to purchase the property at foreclosure sale. Thereafter a corporation was formed which took over the title to the property at a sum in excess of the amount paid on the foreclosure proceedings, the purchase price to be secured by mortgages made by the corporation. The corporation then agreed to convey the

property to the former owner for the increased amount. The question arose whether the transaction was a purchase and sale agreement or a loan with security in the nature of a mortgage transaction. The representatives of the Realization Company always referred to the transaction "as a purchase of the property and a sale at a good profit". The Court held the transaction to be a mortgage and not a sale and said:

> "But regardless of the language used in the negotiations as descriptive of the transaction, if the transaction was in substance merely a device for the purpose of evading the usury laws, the plea must be sustained, for the law does not tolerate any device to avoid the consequences of unlawful acts. The authorities are unanimous that the courts will disregard the form which a contract may take, but look to the substance of the transaction in order to determine whether or not it is usurious. The books contain many cases where artful contrivances have been resorted to whereby the lender is to receive some other advantage or something of value beyond the repayment of the loan with legal interest."
>
> . . . . .
>
> "From time immemorial needy borrowers have consented to any terms imposed upon them, and in the opinion of the court the realization company was organized for the very purpose of taking advantage of the necessities of such persons."